

(2011) 01 CAL CK 0014
In the Calcutta High Court

Case No : A.P.O. No. 322 of 2009 and W.P. No. 2610 of 1994.

Regional Provident Fund Commissioner and Another	APPELLANT
Vs	
Superintendence Company of India Pvt. Ltd.	RESPONDENT

Date of Decision : 21-01-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 7(1), 7A

Citation : (2011) 3 CHN 242 : (2011) 129 FLR 1071 : (2012) 1 LLJ 703

Hon'ble Judges : Pinaki Chandra Ghose, J; Asim Kumar Ray, J

Bench : Division Bench

Advocate : Pradosh Mallick and Anil Kumar Gupta, for the Appellant; Anil Chowdhury and P.S. Pal Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghosh, J.—This appeal is directed against an order dated 21st May, 2010. It appears that the writ petition being W.P. No. 2610 of 1994 was dismissed for default on 23rd April, 2002. Subsequent thereto, the matter was restored on 23rd May, 2002. The said writ petition was disposed of by Arun Kumar Mitra, J. (as His Lordship then was). On 8th April, 2003 His Lordship was pleased to pass the following order:

The Court: In this writ petition the Petitioner has made following prayers:

(a) Writ and/or Order and/ or Direction in the nature of Mandamus directing the Respondents to withdraw and/or cancel and/or forbear from giving effect or further effect to the order dated 14th February, 1994 passed by the Regional Provident Fund Commissioner, West Bengal, Respondent No. 1, (Annexure "F-1" of this petition);

(b) Writ and/or Order and/or Direction in the nature of certiorari directing the Respondents to certify and transmit to this Hon'ble Court records for the proceedings pertaining to the issue of the said impugned order dated 14th

February, 1994 passed by the Respondent No. 1 (Annexure "F-1" of this petition) so that conscionable justice may be done by quashing the same;

(c) Writ and/ or Order and/ or Direction in the nature of prohibition directing the Respondents to refrain from abusing jurisdiction vested in them and from giving effect or further effect to the impugned order dated 14th February, 1994 issued by the Regional Provident Fund Commissioner, West Bengal, Respondent No. 1, (Annexure "F-1" to the petition);

(d) Rule NISI in terms of the aforesaid prayers;

(dd) The provisions of the said "declaration Employees" Provident Fund and Miscellaneous Provisions Act, 1952 be applied to your Petitioner, if at all only prospectively from the date of the order to be passed herein;

It is submitted by Mr. Choudhury that the Provident Fund Scheme is made for employees and the company Petitioner is the Superintending company. It has not been doing fabrication business. Mr. Roychoudhury submits that the company only does inspection analyze and submits their reports and these are now their job. Neither the company manufactures nor buys and raw materials and the company only inspects and analyses its quality control. For this purpose, the company is to engage engineer and this is obvious.

Mr. Roychoudhury relies on a decision in AIR 98 page 370 where it has been observed that a claim under the Provident Fund Scheme can be prospective not a retrospective. Mr. Roychoudhury submits that the company intends to come under the coverage that is under the umbrella of the company but there cannot be retrospective way of operation of the Government circular because it must be prospective.

After considering the submissions made by Mr. Roychoudhury and on perusal of the averments made in the writ petition along with the annexures I direct the Provident Fund Authorities to consider their scheme and they want to cover the company prospectively with effect from the date of passing of this judgment and order by this Court.

The company Petitioner will be treated as coverage under the scheme envisaged by the Provident Fund Authority as alleged in this writ petition with prospective effect and the Provident Fund Authority in No. way be entitled to make any demand or deduction of any amount and to take steps in terms of the Government circular with retrospective effect.

With the above directions this writ petition is disposed of. There would be No. order as to costs.

All parties are to act on a signed Xerox copy of this judgment on the usual undertaking.

2. Subsequent thereto in May, 2003 the Regional Provident Fund Authorities took up an application being G.A. No. 1827 of 2003 and prayed for modification and/

or variation and/or recalling of the said judgment and order dated 8th April, 2003, passed by His Lordship Arun Kumar Mitra, J. (as His Lordship then was) on the ground that they had not had an opportunity to file an affidavit-in-opposition to the amended writ petition. The said application being G.A. No. 1827 of 2003 was finally heard and disposed on 12th July, 2007 by His Lordship the Hon''ble Justice Biswanath Somadder when His Lordship was pleased to pass the following order:

....

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However, I am of the opinion that since the application filed by the Regional Provident Fund Authorities is still pending before this Court till today, for the interest of justice, the Regional Provident Fund Authorities may be given an opportunity to file their affidavit-in-opposition to the amended writ petition. In that view of the matter, I permit the Regional Provident Fund Authorities to file their affidavit-in-opposition to the amended writ petition within 7th August, 2007. Reply, if any, may be filed within 14th August, 2007. The main writ petition shall appear on 16th August, 2007 under the heading "For Hearing".

I make it clear that this direction for filing of affidavits is peremptory in nature and No. extension of time shall be granted under any circumstances.

....

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3. The said order was passed on 24th July, 2007 in the said G.A. No. 1827 of 2003.

4. Subsequent thereto the Regional Provident Fund Authority filed an affidavit-in-opposition to the amended writ petition and affidavit-in-reply was also filed by the learned Counsel on behalf of the writ Petitioner.

5. It appears from the facts that on 7th October, 2002 the prayer for amendment of the writ petition was allowed on 8th April, 2003 when the Court was pleased to add the following prayer in the writ petition which is quoted hereunder:

(dd) the provisions of the said declaration Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 be applied to your Petitioner, if at all only prospectively from the date of the order to be passed herein.

6. The facts of the case briefly are as follows:

The Petitioner company is a Private Limited company/The main job of the company is to do inspection, sampling, analysis and survey work in the field of ores, materials, chemicals and textiles, pre-shipment export inspection and inspection of imports. The above work of inspection and survey did not come under the definition of rendering expert services which is defined in the Act as supply of personnel, advice on domestic and departmental enquiry, special

services in rectifying pilferage, thefts and pay Roll irregularities to factories and establishment. Admittedly the function of the company did not come under the expert services and thereby does not come under the definition of "rendering expert services", as defined in the Employees' Provident Funds and Miscellaneous Provisions Act, 1992 (hereinafter referred to as the said Act). It appears that several correspondences were exchanged between the Appellant commissioner and the company since 1974. However, the company approached the Court under its writ jurisdiction when a memo dated 7th June, 1994 was issued by the Assistant Provident Fund Commissioner directing the writ Petitioner to comply with the provisions of the Act as directed by the office order communicated under endorsement dated 29th March, 1994.

7. The Hon'ble First Court decided the question whether the company could be appropriately brought under the category of "Engineers and Engineering Contractors" and after considering the facts of this case the Hon'ble First Court held as follows:

Therefore, this Court has No. hesitation to hold that by retrospectively applying the Scheme, the writ Petitioner cannot be asked to pay the employees' contribution for the period antecedent to the judgment and order dated 8th April, 2003 passed by Arun Kumar Mitra, J., as neither the said Act nor the Scheme permits any such payment or deduction and the establishment cannot be saddled with the liability to pay the employees' contribution for the retrospective period since the establishment has No. right to deduct the same from the future wages payable to its employees.

In the facts and circumstances of the instant case, I find No. reason or justification to modify and/ or vary the judgment and order dated 8th April, 2003, passed by Arun Kumar Mitra, J.

8. Being aggrieved, this appeal has been filed by the Appellant herein.

9. Mr. Pradosh Mallick, learned Senior Advocate appearing on behalf of the Appellant contended that there is No. dispute that the writ Petitioner has more than 20 employees and, therefore, the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the said Act) applicable to the said establishment.

10. He further submitted that initially the writ Petitioner was covered as a trading and commercial establishment u/s 1(3)(b) of the said Act with effect from 1965 and the said establishment was directed to comply with the provisions of the said Act with effect from 1st October, 1965. He further submitted that the said order was never challenged by the writ Petitioner. He further tried to contend before us that the writ Petitioner again covered with effect from 31st May, 1971 u/s 1(3)(b) of the said Act under the schedule head "Establishment rendering expert service".

11. On 4th May, 1989 the said matter was adjudicated upon by the Regional Provident Fund Commissioner, West Bengal. The writ Petitioner was asked to

comply with the said order with effect from 1st April, 1974 as an establishment of "Engineer and Engineering Contractors not being exclusively engaged in building and construction industries". By a letter dated 26th September, 1989 the writ Petitioner disputed the said coverage and a proceeding u/s 7-A of the said Act was initiated. The Provident Fund Commissioner held that the writ Petitioner's company was an establishment of "Engineer and Engineering Contractors not being exclusively engaged of building and construction industries".

12. The said order of 14th November, 1994 passed by the Regional Provident Fund Commissioner, West Bengal. Mr. Mallick submitted that the said order is an appealable order u/s 7-1 of the said Act and he submitted that a Writ application was not maintainable and the same was liable to be dismissed.

13. He contended that the obligation to pay would apply from the date of extension of the provisions of the scheme to the particular establishment under the said scheme. Mr. Mallick further contended that when the alternative remedies are available to the writ Petitioner, No. order should have been passed by the Court. Hence, he submitted that the order should be set aside and appeal should be allowed.

14. Mr. Mallick drew our attention in the case of Rohtas Industries Ltd. Vs. Union of India (UOI), and submitted that claim for arrears of contribution for the back period was fully sustainable in law.

15. On the contrary, Mr. Ahin Chowdhury, learned Senior Advocate appearing on behalf of the Respondent submitted that the Provident Fund Scheme is made for employees and this company never take any fabrication business. The writ Petitioner only does inspection, analyse and submits their reports. Neither the company manufactures nor buys any raw materials. The company inspects and analyses its quality control. For this purpose the company is to engage engineers.

16. Mr. Chowdhury further contended that a claim under the Provident Fund Scheme can be prospective and can not be a retrospective one. He further submitted that the company intends to come under the coverage that cannot be retrospective.

17. Unless some elements of engineering contracts are present i.e. fabrication, construction etc. it cannot be said or characterized the activities of the company as ""Engineer and Engineering of contractors". Therefore, it would not come within the meaning of "Engineer and Engineering of contractors".

18. He drew our attention to a decision, Wire Netting Stores Vs. Regional Provident Funds Commissioner and Others, and The Regional Provident Funds Commissioner v. Shibu Metal Works 1965 (11) FLR 46 (SC). and relying on such decisions he submitted that in order to find out whether any establishment comes within a particular category mentioned in the schedule, it is the character of the activity of the undertaking has to be looked into.

19. He further submitted from the facts it would be evident that the Regional

Provident Fund Commissioner could not decide under which category, if at all, the writ Petitioner should be covered. He further pointed out that the Appellant authorities at different stages accepted the contention of the writ Petitioner and de-covered under the first two heads as suggested by them. He further submitted that the writ Petitioner wants to have coverage under the said Scheme only in appropriate and under correct coverage. The authority should take steps to do so in accordance with the provisions of law.

20. After the order dated 8th April, 2003 the writ Petitioner started depositing money and it was the Provident Fund Commissioner was not settling the dues of the employees on the ground that the coverage in question is still pending. He further pointed out that if retrospective effect is given, its recovery and deduction cannot be possible at this time. According to him in the last several decades many people have left the establishment, many have retired and also died. Therefore, it is impossible for the company to make any contribution in respect of those who had left and those who had retired after taking settlement and also those who are not alive. In support of his contention reliance was placed on *The District Exhibitors Association, Muzaffarnagar and Ors. v. Union of India* 1991 (62) FLR 812 (SC).

21. It is submitted that only submission has been made on behalf of the Appellant that the writ Court should not have entertained the writ petition since there was an alternative remedy. But according to him the alternative remedy cannot be a bar for entertaining a writ petition which has already been decided by the Hon'ble Supreme Court. He further submitted that since the affidavits have been filed by the Appellant before the learned Trial Court at this stage they cannot turn around and take a separate plea.

22. After hearing the learned Counsel for the parties and after analyzing the facts and the materials placed before us it appears to us that the amendments were introduced to the writ petition were merely on legal grounds. It also appears to us that after the order passed by His Lordship Arun Kumar Mitra, J. (as His Lordship then was) on 8th April, 2003, the Appellant did not take any steps in the matter against the writ Petitioner. There is No. ground or the cogent reasons placed before the Court that why the Respondent prevented themselves to proceed against the establishment after the order was passed u/s 7-A of the said Act on 14th February, 1994. On these facts it appears to us that the Hon'ble Single Judge came to the conclusion that the conduct of the Appellant would show that they were merely sitting on the fence for nine years. It appears from the decision of this High Court in *Aluminum Corporation* (supra) when the Court observed as follows:

Para 13. First the preamble to the Act says that it is an Act "to provide for the institution of provident funds for employees in factories and other establishments". It is therefore inapplicable in respect of those employees who have left the service by taking away their own provident fund moneys because the company itself has its own provident fund scheme.....

23. The Hon^{ble} Supreme Court in the case of The District Exhibitors Association (supra) held as follows:

Para 20. The question, however, is whether by making the Scheme with retrospective operation, the employer could be saddled with the liability to pay employees' contribution w.e.f. 1st October, 1984 and if not from what other date? The answer to the question turns upon the implementation of the Scheme and in particular the giving effect to paras 30 and 32 of the Scheme. Para 30 provides that the employer shall, in the first instance, pay both the contributions payable by himself and also the contribution payable by the employees. It shall be the responsibility of the principal employer to pay both the contributions payable by himself and also in respect of the employees directly employed by him and also in respect of the employees employed by him or through a contractor. Para 32 confers upon the employer the right to recover the employees contribution that has been paid by him under para 30. That could be recovered by the employer by means of deduction from the wages of the employees who are liable to pay. First proviso to para 32(1), however, limits that liability in expressly stating that No. such deduction may be made from any wage other than that which is paid in respect of the period of which is paid in respect of the period of which the contribution is payable. It is obvious from paras 30 and 32 that the employer has to pay the contribution of the employee's share but he has a right to recover that payment by deducting the same from the wages due and payable to the employees. It is significant to note that the deduction is not from the wages payable for any period, but only from the wages for the period in respect of which the contribution is payable and No. deduction could be made from any other wages payable to the employees. In other words, the payment of employees contribution by the employer with the corresponding right to deduct the same from the wages of the employees could be only for the current period during which the employer has also to pay his contribution.

24. In these circumstances and on the given facts it appears to us that the activity of the writ Petitioner under the schedule head of "Engineers and Engineering Contractors" can not come within the meaning of the said head. We also hold that in accordance with the law laid down by the Courts retrospective effect cannot be given in respect of a statute until and unless it is specifically mentioned in the statute. Similarly coverage under the appropriate schedule also cannot be retrospectively would lead to absurdity since fact would show that many employees have already left service the same world some retired, some of them left this world also. Therefore, such fact also has to be considered and if we apply the said decisions as has been held in the decision of this High Court in the case of Aluminium Corporation (supra) the decision of the Hon^{ble} Supreme Court in the case of The District Exhibitors (supra) the position of law is absolutely clear and without any ambiguity. Therefore, in our opinion, the learned Trial Judge correctly held that the writ Petitioner cannot be asked to pay the employees' contribution for the period prior to the judgment and/order dated 8th April, 2003 passed by His Lordship Arun Kumar Mitra, J. (as His Lordship

then was) and the writ Petitioner cannot be saddled with the liabilities to the employees' contribution for the retrospective period and, therefore, on such reasons we affirm the opinion expressed by the Hon'ble Single Judge.

25. We do not find any merit in the appeal. We also do not find that the order of the Hon'ble Single Judge suffers from any irregularity and/or illegality or can call for any interference by this Court. Hence, we affirm the decision of the learned Trial Court.

26. For the reasons stated hereinabove, this appeal is dismissed.

27. Xerox certified copy of this order, if applied for, be supplied to the parties on usual undertakings.